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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. ANN LOUISE POWELL, Defendant and Appellant.	C045673 (Super. Ct. Nos. CM017516, CM018971)

Following her pleas of guilty, defendant Ann Louise Powell appeals from a judgment and sentence to state prison.

Since there was no preliminary hearing in this matter, the facts of the offenses are drawn from the probation report, which summarized the Butte County Sheriff's office report of the offenses. On April 13, 2002, Butte County sheriff's deputies were dispatched to a residence in Oroville based on a report of a domestic dispute. Upon arrival, the deputies contacted defendant, who was in possession of a cutlery fork. When defendant refused to assist the deputies, they contacted

defendant's mother, who also was inside the residence. The mother told the deputies that defendant had telephoned defendant's husband for a ride. When the husband arrived a few hours later than expected, defendant became angry and began yelling at him. Defendant went to the kitchen, got a butcher knife and cutlery fork, returned to the living room, told her husband she was going to "kill" him, and "threw the butcher knife in his direction." The husband ran away, but defendant chased him throughout the residence, and then down the street after he escaped through a sliding door.

Defendant was charged in case No. CM017516 with assault with a deadly weapon by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1) - count 1; undesignated section references are to the Penal Code) and making a criminal threat (§ 422 - count 2). The complaint also alleged that defendant personally used a deadly and dangerous weapon as to each count. (§ 12022, subd. (b)(1).)

As part of a negotiated plea, defendant pled guilty to both counts on condition that the personal use allegations would be dismissed. The written change of plea agreement specified that defendant's maximum sentence would be four years eight months in prison. The agreement also recited that defendant had been advised of the consequences of her plea, including the possibility of consecutive sentences. At the change of plea hearing, defendant confirmed that she understood the possible consequences of her plea as well as the maximum penalty. Defense counsel raised no objection.

On April 16, 2003, defendant was caught stealing a digital camera and a pair of tennis shoes from a Wal-Mart store in Chico. She was charged with petty theft with a prior (§ 666) in a separate complaint, case No. CM018971. Defendant pled no contest to this charge, with the maximum term specified as three years in prison.

At the combined sentencing hearings in case Nos. CM017516 and CM018971, the court sentenced defendant to the midterm of three years on the assault with a deadly weapon conviction, with consecutive eight-month subordinate terms on the criminal threat and petty theft with a prior convictions, for an aggregate prison term of four years four months.[1]

DISCUSSION

I

Section 654

Defendant contends the trial court violated the multiple punishment proscription of section 654[2] by failing to stay the sentence on the criminal threat conviction instead of running it consecutive to the assault with a deadly weapon conviction

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[1] The court also imposed two consecutive 90-day jail terms for probation violations, and ran them concurrent to the prison term. They are not at issue on appeal.

[2] Section 654, subdivision (a), provides, in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

because both convictions arose out of an indivisible course of conduct. The Attorney General contends the appeal is barred by California Rules of Court, rule 4.412(b) (undesignated references to rules are to the California Rules of Court). Rule 4.412(b) (formerly rule 412(b)) states: "By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record."

The question whether a defendant, who agrees to a maximum term of imprisonment, can then assert a section 654 bar to a portion of the term is pending in the California Supreme Court. (*People v. Shelton* (2004) 117 Cal.App.4th 138, review granted June 16, 2004, S124503.)

We need not resolve this issue, because, assuming for the sake of argument that defendant can assert a section 654 claim on appeal, it fails on the merits.

Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208.) If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. (*Ibid.*) The defendant, however, may be punished for each offense if she acted with multiple criminal objectives that were independent of and not merely incidental to each other, even though the violations were parts of an otherwise indivisible

course of conduct. (*People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Beamon* (1973) 8 Cal.3d 625, 637-639.) "The principal inquiry in each case is whether the defendant's criminal intent and objective were single or multiple. Each case must be determined on its own facts. [Citations.]" (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135.) The defendant's intent and objective are factual questions for the trial court, and its ruling on these matters will be upheld if supported by substantial evidence. (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) "We review the [trial] court's determination of [defendant's] 'separate intents' for [substantial] evidence in a light most favorable to the judgment, and presume in support of the court's conclusion the existence of every fact the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 271.)

Applying this standard, we conclude that substantial evidence supports the trial court's conclusion that the crimes were primarily independent of each other. The parties appear to assume that the assault with a deadly weapon was the act of hurling the knife at the victim in conjunction with the criminal threat. Defendant, however, subsequently chased her husband throughout the residence and then down the street, presumably with a cutlery fork still in hand, since she still possessed it when the sheriff's deputies arrived. On these facts, the trial court properly could conclude that defendant's intent with respect to the threat to "kill" her husband was to put him in

immediate fear for his life, and the act of hurling the butcher knife "in his direction" was to impress upon him that she was earnest. Defendant thereupon chased her husband throughout the house and down the street in an actual assault with a deadly weapon, and with the apparent intent to inflict great bodily injury. The two criminal acts, though temporally proximate, were nonetheless motivated by separate criminal intents, and accordingly separately punished.[3]

Our conclusion that defendant's sentence does not violate section 654 obviates the need to discuss defendant's due process and double jeopardy claims, which are premised on a section 654 violation.

II

Ineffective Assistance of Counsel

Defendant contends that counsel was ineffective for failing to object both to the consecutive sentence on the criminal threat conviction and the factual predicate therefor, namely, that the crimes and their objectives were primarily independent of each other.

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[3] Neither of the two cases upon which defendant principally relies for a contrary result--*People v. Toledo* (2001) 26 Cal.4th 221 at page 226, footnote 2, and *People v. Jenkins* (2001) 86 Cal.App.4th 699 at page 702--even discusses any issue with respect to section 654. Since cases are not authority for propositions not considered (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 198), the cited cases fail to assist defendant.

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that a determination more favorable to defendant would have resulted but for counsel's unprofessional errors. (*People v. Kipp* (1998) 18 Cal.4th 349, 366.) In reviewing a claim of ineffective assistance on appeal, we accord great deference to trial counsel's tactical decisions (*In re Fields* (1990) 51 Cal.3d 1063, 1069-1070), and reverse "'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.) Where the record is silent, a claim of ineffective assistance is more appropriately made in a habeas corpus proceeding than on appeal, since a habeas proceeding allows defense counsel "to explain the reasons for his or her conduct." (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

Defendant has failed to satisfy either of her dual burdens in order to prevail on this claim. As our discussion of section 654 demonstrates, the limited factual record provides evidentiary support for defendant's sentence, so there is no support for a claim that counsel's representation fell below an objective standard of reasonableness. In addition, a sound tactical reason existed for the decision to forego a section 654 objection, since the sentence the court imposed for the assault with a deadly weapon and criminal threat convictions (three

years eight months) was actually less than a sentence the court could have imposed (the upper term of four years on the assault with a deadly weapon conviction) had a section 654 objection been sustained. This disparity also demonstrates that defendant has not shown a reasonable probability that she would have received a more favorable determination had counsel objected.

III

Abstract of Judgment

Defendant's final claim is premised on the inclusion in the abstract of the judgment of a recommendation that defendant be ordered to participate in a batterer's treatment program as a condition of parole, contrary to section 1213.[4] Defendant contends that the recommendation has no place in the abstract of

[4] Section 1213 provides: "When a probationary order or a judgment, other than of death, has been pronounced, a copy of the entry of that portion of the probationary order ordering the defendant confined in a city or county jail as a condition of probation, or a copy of the entry of the judgment, or, if the judgment is for imprisonment in the state prison, either a copy of the minute order or an abstract of the judgment as provided in Section 1213.5, certified by the clerk of the court, or by the judge, if there is no clerk, and a Criminal Investigation and Identification (CII) number shall be forthwith furnished to the officer whose duty it is to execute the probationary order or judgment, and no other warrant or authority is necessary to justify or require its execution.

"If a copy of the minute order is used as the commitment document, the first page or pages shall be identical in form and content to that prescribed by the Judicial Council for an abstract of judgment, and such other matters as appropriate may be added thereafter."

judgment, and that the recommendation should have been included in a statement filed pursuant to section 1203.01.[5]

This contention, to which the Attorney General does not respond, fails to withstand scrutiny. Section 1213 does not prohibit inclusion of a recommended condition of parole in the abstract of judgment. It references an abstract of judgment as provided in section 1213.5, which itself provides (in full) that

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[5] Section 1203.01 states: "Immediately after judgment has been pronounced, the judge and the district attorney, respectively, may cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with any reports the probation officer may have filed relative to the prisoner. The judge and district attorney shall cause those statements to be filed if no probation officer's report has been filed. The attorney for the defendant and the law enforcement agency that investigated the case may likewise file with the clerk of the court statements of their views respecting the defendant and the crime of which he or she was convicted. Immediately after the filing of those statements and reports, the clerk of the court shall mail a copy thereof, certified by that clerk, with postage prepaid, addressed to the Department of Corrections at the prison or other institution to which the person convicted is delivered. Within 60 days after judgment has been pronounced, the clerk shall mail a copy of the charging documents, the transcript of the proceedings at the time of the defendant's guilty plea, if the defendant pleaded guilty, and the transcript of the proceedings at the time of sentencing, with postage prepaid, to the prison or other institution to which the person convicted is delivered. The clerk shall also mail a copy of any statement submitted by the court, district attorney, or law enforcement agency, pursuant to this section, with postage prepaid, addressed to the attorney for the defendant, if any, and to the defendant, in care of the Department of Corrections, and a copy of any statement submitted by the attorney for the defendant, with postage prepaid, shall be mailed to the district attorney."

"[t]he abstract of judgment provided for in Section 1213 shall be prescribed by the Judicial Council." The form prescribed by the Judicial Council includes a space for "[o]ther orders." (Judicial Council Forms, form CR-290, p. 2, ¶ 11; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1084.) By statute, "[e]very direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." (Code Civ. Proc., § 1003.) By allocating a space for "[o]ther orders" in an abstract of judgment, the Judicial Council has authorized the inclusion of "[e]very direction of a court or judge, made or entered in writing, and not included in a judgment," in the abstract of judgment itself. The recommendation that defendant be enrolled in a batterer's treatment program upon the granting of parole is such a directive.

In addition, rule 4.480, which implements section 1203.01, specifies that "a statement should be submitted by the judge in any case in which he or she believes that the correctional handling and the determination of term and parole should be influenced by information *not contained in other court records*." (Italics added.)[6] The purpose of section 1203.01 is to

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[6] Rule 4.480 states in full: "A sentencing judge's statement of his or her views under section 1203.01 respecting a person sentenced to the Department of Corrections is required only in the event that no probation report is filed. Even though it is not required, however, a statement should be submitted by the judge in any case in which he or she believes that the correctional handling and the determination of term and parole

communicate to the Board of Prison Terms "information which is relevant, and in fact essential, to effective administration of the []determinate sentence and parole laws without incurring the unnecessary burden of a second fact-finding process." (*In re Minnis* (1972) 7 Cal.3d 639, 650; § 3053, subd. (a) [Board of Prison Terms may impose conditions upon granting parole to any prisoner].) In cases where the trial court can adequately communicate to prison and parole officials the same directive(s) in an abstract of judgment that would be included in a section 1203.01 statement, neither sections 1203.01, 1213, nor 1213.5 prohibit such action.

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should be influenced by information not contained in other court records.

"The purpose of a section 1203.01 statement is to provide assistance to the Department of Corrections in its programming and institutional assignment and to the Board of Prison Terms with reference to term fixing and parole release of persons sentenced indeterminately, and parole waiver of persons sentenced determinately. It may amplify any reasons for the sentence which may bear on a possible suggestion by the Director of Corrections or the Board of Prison Terms that the sentence and commitment be recalled and the defendant be resentenced. To be of maximum assistance to these agencies, a judge's statements should contain individualized comments concerning the convicted offender, any special circumstances which led to a prison sentence rather than local incarceration, and any other significant information which might not readily be available in any of the accompanying official records and reports.

"If a section 1203.01 statement is prepared, it should be submitted no later than two weeks after sentencing so that it may be included in the official Department of Corrections case summary which is prepared during the time the offender is being processed at the Reception-Guidance Center of the Department of Corrections."

DISPOSITION

The judgment is affirmed.

SIMS, Acting P.J.

We concur:

NICHOLSON, J.

ROBIE, J.